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Supreme Court of the United States

OCTOBER TERM, 1958

No. 396

PLUMBERS, STEAMFITTERS, REFRIGERATION,
PETROLEUM FITTERS, AND APPRENTICES OF
LOCAL NO. 298, A. F. OF L., ET AL., PETITIONERS,

vs.

COUNTY OF DOOR, A MUNICIPAL CORPORATION,
ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE
STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED SEPTEMBER 24, 1958
CERTIORARI GRANTED NOVEMBER 10, 1958

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Record from the Circuit Court of Door County, State of Wisconsin		
Appendix to appellee's brief	1	1
Memorandum decision from the bench	1	1
Complaint	3	3
Answer	6	5
Findings of fact and conclusions of law	8	6
Restraining order	12	9
Stipulation re Record on final judgment	13	9
Judgment and order for permanent injunction	14	10
Abridgment of testimony	14	11
Note re Amendment to complaint	14	11
Motion to amend complaint and granting thereof	14	11
Testimony of George Schmelzer—		
direct	15	11
cross	17	12
redirect	20	14
recross	20	14

Appendix to appellant's brief—Continued
 Abridgment of testimony—Continued

	Original	Print
Testimony of Lawrence Johnson—		
direct	21	15
Theodore Oudenhoven—		
direct	22	16
cross	23	17
Arnold G. Zahn—		
direct	25	18
cross	26	18
Richard Garot—		
direct	27	19
Walter Ducat—		
direct	28	20
Fred Renard—		
direct	28	20
cross	29	20
redirect	29	21
George Reeke—		
direct	30	21
Patrick Martin	31	22
Stipulation of facts	32	22
Richard Garot—		
direct	32	23
cross	33	23
Proceedings in the Supreme Court of the State of Wisconsin	38	24
Argument and submission	38	24
Judgment	39	25
Opinion, Martin, J.	40	26
Concurring opinion, Currie, J.	50	34
Dissenting opinion, Fairchild, J.	54	36
Order denying rehearing	57	38
Clerk's certificate (omitted in printing)	58	38
Order allowing certiorari	59	38

**IN THE CIRCUIT COURT OF DOOR COUNTY
STATE OF WISCONSIN**

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD
G. ZAHN and THEODORE OUDENHOVEN, Plaintiffs,

v.

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM
FITTERS, AND APPRENTICES OF LOCAL NO. 298, AF OF L,
and BUILDING AND CONSTRUCTION TRADES COUNCIL OF
GREEN BAY, WISCONSIN, AND VICINITY, Defendants.

[fol. 1]

Appendix to Appellant's Brief

MEMORANDUM DECISION FROM THE BENCH—July 25, 1957

The record in this case clearly establishes that there was no controversy between the plaintiff, Door County, the owner of the court house building to be constructed, and any of the sub-contractors or any employees of Door County. The record is equally clear that there was no controversy between the general contractor, as employer, and his employees. The record is clear that there was no controversy between plaintiff Zahn, as employer and plumbing contractor, and either of his two employees.

I am constrained to find that at the time the picket line was established and one picket employed who carried a sign, which action was directed and initiated by Richard Garot, a business representative of the Plumbers, Steamfitters, Petroleum Fitters and Apprentices of Local Union 298, AFL-CIO, the union that Mr. Garot represented was not a representative of any employee and was not the bargaining agent so that they were a party to the contracts or the situation generally that could give rise to a labor dispute.

There being no labor dispute and no situation that could give rise to a labor dispute, the physical presence of the picket from the first time the first picket was placed and oc-
[fol. 2] cupied a position on the sidewalk outside the court-
house, and the second picket, was coercive action in itself

and amounted to economic pressure and was designed to cause a work stoppage, which did occur. Picketing is not confined to advertising the cause of a union, which they have a perfect right to do under the Fourteenth Amendment, I believe it is, or anyway the freedom of speech; guarantee under the Constitution. There being no labor dispute in this case, the picketing was unlawful picketing as prohibited by Sec. 103.535, Wisconsin Statutes.

The claim that this project was an engagement in interstate commerce because the greater part, in money, of the cost of materials and of the entire project was goods or material manufactured outside of the state, is without merit. I say that it is without merit for these reasons. (1) That by no concept or strained construction of the Interstate Commerce Clause can the construction of a building be called engaging in interstate commerce. (2) The plaintiff, Door County, who is aggrieved in this matter because of the work stoppage on the construction of their courthouse which they are required under the law to construct, could not, by its very character, engage in interstate commerce. Regardless of the fact this undertaking and this project does not partake of the character of an interstate commerce undertaking, the state courts have jurisdiction to enforce their own statutes against any unlawful act. The Supreme Court of the United States has stated that Congress, in the enactment of [fol. 3] the Taft-Hartley Law, did pre-empt certain fields of labor. However, in more recent decisions, the U. S. Supreme Court has made clear that the area of enforcement of the law where substantial rights of citizens of the state are affected by unlawful conduct, that state courts can act, that the legislature can speak and that state courts can enforce injunctions.

This picketing being unlawful, which I find to be the fact, did constitute a violation of the law and a violation of the statute and it is a proper subject of equitable relief.

It follows from what has been said that the temporary injunction will be issued, and a bond of \$2000 to be furnished by the plaintiff, Door County, and filed with the Clerk of Circuit Court of Door County prior to the presentation to the Court and filing of the temporary injunction.

It is ordered that counsel for the plaintiffs prepare and submit to the Court and to opposing counsel formal written findings of fact and conclusions of law consistent with the memorandum decision rendered from the bench.

Dated: July 25, 1957.

IN CIRCUIT COURT OF DOOR COUNTY

COMPLAINT

Now comes the plaintiffs, County of Door by Donald J. Howe, District Attorney, and Arnold G. Zahn and Theodore [fol. 4] Oudenhoven, by Donald J. Howe, their attorney, and for a cause of action against the defendants allege and show the court as follows:

1. That the plaintiff County of Door is a municipal corporation organized and operating under and pursuant to the laws of the State of Wisconsin, and plaintiff Arnold G. Zahn is a plumbing contractor residing at Sturgeon Bay, Door County, Wisconsin, and plaintiff Theodore Oudenhoven is engaged in the general construction business under the trade name of Oudenhoven Construction Company, and his residence and business address is Kaukauna, Wisconsin.

2. That the defendant Plumbers Local Union No. 298 is a labor organization with its office in Green Bay, Brown County, Wisconsin.

3. That the Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity is an organization composed of representatives of organized labor of the various trades, engaged in the construction business in Green Bay, Wisconsin, and vicinity, and that the term "vicinity" includes Door County, Wisconsin.

4. That heretofore, on the 1st day of March, 1957, the plaintiff Door County entered into contract with the plaintiff Arnold G. Zahn to do plumbing work on the addition to the Door County Courthouse.

5. That heretofore, on the 1st day of March, 1957, the plaintiff County of Door entered into a contract with the

[fol. 5] plaintiff Theodore Oudenhoven, doing business as Oudenhoven Construction Company, to do the general contracting work upon an addition to the Door County Courthouse.

6. That heretofore, on the 17th day of July, 1957, the defendant union perpetrated unfair labor practices in that it promoted and induced picketing in a manner not constituting an exercise of constitutional guaranteed freedom of speech, and have hindered and prevented by picketing and other means the lawful work and employment of the plaintiffs, and have obstructed and interfered with the entrance to and egress from the plaintiffs' place of employment, to-wit: The addition to the Door County Courthouse, located in the City of Sturgeon Bay, Wisconsin, and has prevented the plaintiff Theodore Oudenhoven, doing business as Oudenhoven Construction Company, from the performance of this contract with the plaintiff County of Door.

7. That the conduct of the defendants is violative of Section 103.535 of the Wisconsin Statutes in such case made and provided.

8. That there is no labor dispute existing between the plaintiffs and the defendants or between the plaintiffs or any of their employees or between the employees of the plaintiffs and the defendants, within the meaning of Section 103.62(3).

9. That the unlawful acts have been committed and will continue unless restrained; that substantial and irreparable [fol. 6] injury to plaintiffs will follow unless injunctive relief is granted; that greater injury will be caused to plaintiffs than to defendants if relief is granted; that the plaintiffs have no adequate remedy at law; that the public officers charged with the duty to protect plaintiffs' property are unable to furnish adequate protection; that the relief prayed for does not violate Section 103.535.

Wherefore, Plaintiffs pray that an injunction be issued against the defendants, their agents and officers, restraining them from continuing the acts set forth in this complaint.

Donald J. Howe, Attorney for Plaintiffs.

IN CIRCUIT COURT OF DOOR COUNTY

CLERK'S NOTE: RE ANSWERS

A separate answer was filed on behalf of the defendant, Building and Construction Trades Council of Green Bay, Wisconsin, and Local No. 298, Plumbers and Steamfitters Union, of Green Bay, Wisconsin. Both answers were identical except for the identification of the defendant.

IN CIRCUIT COURT OF DOOR COUNTY

ANSWER

1. Admits the allegations of paragraphs one and three of the plaintiffs' complaint.

2. Denies the allegations of paragraphs two, ~~six~~ seven and nine of the plaintiffs' complaint.

3. With reference to paragraph two of the plaintiffs' complaint, alleges that the labor organization representing the plumbers and steamfitters in the Green Bay vicinity [fol. 7] is known as Local 298 of the Plumbers and Steamfitters Union affiliated with the AF of L, CIO.

4. With reference to allegations of paragraphs four and five of plaintiffs' complaint, by reason of lack of information and belief, defendant is unable to form an opinion as to those allegations, and therefore, puts plaintiff to his proof.

5. With reference to paragraph eight of plaintiffs' complaint, defendant alleges that the question of labor dispute is not concerned with under the hereinafter alleged defense, therefore, denies the same.

6. Defendant alleges further that the County of Door, a Municipal Corporation, is an improper party plaintiff, and has no cause of action against the defendants. That the plaintiff Theodore Oudenhoven, has an existing labor contract with the various unions affiliated with the building construction trades, and which contract covers the construction of the Door County Courthouse of Door County,

Wisconsin, the terms of which are more specifically set forth in said contract.

Defendants allege further by way of defense that the construction of the Door County Courthouse addition is covered by the labor management relations act of 1957 Federal Statutes, and that under that statute and the cases so provided, the Wisconsin Statute referred to in plaintiffs' complaint, and any other statute of the state of Wisconsin [fol. 8] and cases with reference to labor relations has been pre-empt by the federal statute and cases, and only the federal statute and cases are controlling with reference to the construction of the Door County Courthouse by reason of the fact that this affects commerce under the commerce clause of the United States Constitution; and further, that if an injunction were granted as prayed for in plaintiffs' complaint, it would be a violation of the United States Constitutional guarantee of freedom of speech.

Wherefore, defendants pray that plaintiffs' complaint be dismissed together with costs and disbursements of this action.

Warne, Duffy, Dwane, Miller & Gerlikowski, Attorneys for Defendants.

IN CIRCUIT COURT OF DOOR COUNTY

Now, Therefore, upon all the records, files and proceedings had herein, I, Arold G. Murphy, Circuit Judge Presiding, do hereby make these my

FINDINGS OF FACT—July 27, 1957

1. That the plaintiff County of Door is a municipal corporation organized and operating under and pursuant to the laws of the State of Wisconsin, and plaintiff Arnold/G. Zahn is a plumbing contractor residing at Sturgeon Bay, Door County, Wisconsin, and plaintiff Theodore Ouden-[fol. 9] hoven is engaged in the general construction business under the trade name of Oudenhoven Construction Company, and his residence and business address is Kaukauna, Wisconsin.

2. That the defendant Plumbers, Steamfitters, Refrigeration, Petroleum Fitters and Apprentices of Local Union No. 298 AF of L, is a labor organization with its office in Green Bay, Brown County, Wisconsin, and is properly designated as Local 298 of the Plumbers and Steamfitters Union affiliated with the AF of L, C.I.O.

3. That the Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity, is an organization composed of representatives of organized labor of the various trades engaged in the construction business in Green Bay, Wisconsin, and vicinity, and that the term "vicinity" includes Door County, Wisconsin.

4. That heretofore, on the 1st day of March, 1957, the plaintiff Door County entered into contract with the plaintiff Arnold G. Zahn to do plumbing work on the Addition to the Door County Courthouse.

5. That heretofore, on the 1st day of March, 1957, the plaintiff County of Door entered into a contract with the plaintiff Theodore Oudenhoven, doing business as Oudenhoven Construction Company, to do the general contracting work upon an Addition to the Door County Courthouse.

[fol. 10] 6. That in addition to the aforesaid contract, the County of Door entered into approximately eight other contracts for the various items of construction on the Addition to the Door County Courthouse.

7. That between the 26th day of June, 1957, and the 5th day of July, 1957, and between the 15th day of July, 1957, and on the 25th day of July, 1957, a picket was placed on the sidewalk near the Door County Courthouse Addition, carrying a placard to the effect that non-union workers were employed on the contract and the designation "Plumbers Local 298, AF of L, CIO."

8. That said picket was placed there by Richard Garot, the business agent for said Local 298 of the Plumbers and Steamfitters Union, affiliated with the AF of L, CIO, and by Walter Ducat, Treasurer of the Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity. That said Richard Garot knew that the effect of placing

the aforesaid picket at such place would be that the union employees would not cross the picket lines and the construction work on the Door County Court house Addition would be halted. That the picketing was intended and did have the effect of halting the construction on said Door County Courthouse Addition.

9. That the purpose of halting construction on the Door County Courthouse Addition was to attempt to coerce the [fol. 11] plaintiff Arnold G. Zahn to force his employees to organize into a union shop, or in the alternative, to force the plaintiff Arnold G. Zahn to release his contract with the plaintiff County of Door.

10. That the conduct of the defendants is violative of Sec. 103.535 and Sec. 11.04 and 11.06(2)(b) of the Wisconsin Statutes in such case made and provided.

11. That there is no labor dispute existing between the plaintiffs and the defendants or between the plaintiffs or any of their employees or between the employees of the plaintiffs and the defendants, within the meaning of Section 103.62(3).

12. That the unlawful acts have been committed and will continue unless restrained; that substantial and irreparable injury to plaintiff County of Door will follow unless injunctive relief is granted; that greater injury will be caused to plaintiffs than to defendants unless relief is granted; that plaintiffs have no adequate remedy at law; that the public officers charged with the duty to protect plaintiffs' property are unable to furnish adequate protection; that the relief prayed for does not violate Section 103.535.

And I find as

CONCLUSIONS OF LAW

1. That no labor dispute exists between the defendants and any employees of the plaintiffs.

[fol. 12] 2. That the picketing is illegal and violative of Sec. 103.535, Sec. 11.04, and Sec. 11.06(2)(b) of the Wisconsin Statutes.

3. That the defendant be restrained and enjoined until final hearing of this matter, or until further order of the court, from picketing the job site at the Door County Courthouse Addition in the City of Sturgeon Bay, Wisconsin.

Let an Order be Entered Accordingly.

Dated this 27th day of July, 1957.

By the Court, /s/ Arold F. Murphy, Judge Presiding.

IN CIRCUIT COURT OF DOOR COUNTY

RESTRaining ORDER—dated July 27, 1957

It Is Ordered:

That until the final disposition of this matter upon trial and until the further order of the Court, the defendant Local 298 of the Plumbers and Steamfitters Union, affiliated with the AF of L, CIO, its agents and officers, and the defendant Building and Construction Trades Council of Green Bay, Wisconsin, and Vicinity, its agents and officers, be and it is hereby restrained and enjoined from picketing or perpetrating any act amounting to picketing on the job site known as Door County Courthouse Addition, in the City of Sturgeon Bay, Wisconsin.

[fol. 13] Dated at Green Bay, Wisconsin, this 27th day of July, 1957.

By the Court, /s/ Arold F. Murphy, Judge Presiding.

IN CIRCUIT COURT OF DOOR COUNTY

STIPULATION RE. ~~RECORD ON~~ FINAL JUDGMENT—
October 21, 1957

It Is Hereby Stipulated and Agreed by and between the plaintiffs and defendants in the above entitled action, through their respective attorneys, that inasmuch as the record herein contains all of the facts and evidence that

would be adduced upon a trial on the merits of the issues herein, the court may consider such record as the record upon which the court may enter such order and final judgment as the court may deem proper.

Dated this 21st day of October, 1957.

/s/ Donald J. Howe, Attorney for the Plaintiffs.

Warne, Duffy, Dewane, Miller & Gerlikowski, By /s/
Lloyd O. Warne, Attorneys for the Defendants.

Upon the foregoing stipulation, the Court on the 23rd day of October, 1957, entered Findings of Facts and Con-
[fol. 14] clusions of Law identical to those for the temporary injunction.

IN CIRCUIT COURT OF DOOR COUNTY

JUDGMENT AND ORDER FOR PERMANENT INJUNCTION—
October 23, 1957

It Is Hereby Ordered and Adjudged that the above named defendants, and each of them, their employees, servants, agents, confederates, associates, and all of the officers and members of said defendant labor organization, be perpetually enjoined and restrained from picketing, or perpetrating any action amounting to picketing, on the job site known as the Door County Courthouse Addition in the City of Sturgeon Bay, Wisconsin.

Dated this 23rd day of October, 1957, at Green Bay, Wisconsin.

By the Court: /s/ Arnold F. Murphy, Judge presiding.

IN CIRCUIT COURT OF DOOR COUNTY

Abridgment of Testimony

NOTE: RE AMENDMENT TO COMPLAINT

Mr. Donald J. Howe, District Attorney for Door County, at the opening of the hearing moved to amend the complaint with respect to paragraph 6 to read: "That heretofore on the 17th day of July, 1957, and prior thereto, the defendant union perpetrated unfair labor practices in that it promoted and induced picketing in a manner not constituting [fol. 15] an exercise of constitutional guaranteed freedom of speech, and have hindered and prevented by picketing and other means the lawful work and employment of the plaintiff, and have obstructed and interfered with the entrance to and egress from the plaintiffs' place of employment, to-wit: The addition to the Door County Courthouse, located in the city of Sturgeon Bay, Wisconsin, and has prevented the plaintiff, Theodore Oudenhoven, doing business as Oudenhoven Construction Company, from the performance of this contract with the plaintiff County of Door."

The Court allowed the amendment.

Direct Examination of George Schmelzer

My name is George Schmelzer. I am chairman of the Door County Property and Building Committee and a member of the Door County Board. As Chairman of the Building and Property Committee, my duty was with the letting of the bids and seeing that the work was lined up and to take care of whatever trouble arises with regard to the construction of the new addition to the Door County Courthouse. The construction of the building was let to low bidders on this job. All of the contractors were union contractors, except Mr. Zahn; the plumbing contractor.

At the time that we were letting the contracts, I did have contact with a union representative named Richard Garot. I was at work in the garage at Baylor Motor Company. [fol. 16] Mr. Garot was the Business Representative of the Plumbers, Steamfitters, Refrigeration, Petroleum Fitters and Apprentices, Local Union 298, A.F. of L., C.I.O.

The conversation that I had with Mr. Garot was that he told me that he understood that we were letting, had let a non-union contractor, and that we could expect trouble because the union men would not work with a non-union contractor on the job. I didn't tell Mr. Garot anything. The only other conversation I had with union men was when one came to see me and told me about the same thing, that as soon as a non-union plumber would get on the job, that the union men would walk off the job. They wouldn't stay on the job. I don't know exactly who the man was, except that he is one of the Reeke crew, his first name being Bob, of Reeke, Heating and Ventilating. I am not sure if that was before or after the contract had been signed with Zahn.

I was aware of the fact that a picket was placed on the courthouse job. I think it was around June 17th. That picketing has interfered with our work in attempting to complete the construction of the courthouse. The picketing has caused me personal difficulty as an officer of the county because we tried every means that we thought we could to get something lined up or straightened up and proceed with the construction of the building. This has caused expense or inconvenience to Door County.

It has caused a delay of work and special county board [fol. 17] meeting and special committee meeting. The block that the courthouse addition will occupy is all dug up and dirt placed around it and the building is started—the roof, floor and the first floor. It has caused some effect on the tenants of the present courthouse. The front door is closed. One of the offices has moved out. That is the ASC. We rented them a room by the month and they are paying \$20 a month to Door County.

At this time work has stopped completely.

Cross Examination by Mr. Warne

I am Chairman of the Property and Building Committee, and as such I was one of the members that reviewed the various bids that were received for the building of the addition to the Courthouse. ASCO of Appleton submitted a bid which was the lowest bid offered for the plumbing

contract in the courthouse. Their bid was \$14,348, and the bid of Arnold Zahn was \$16,655. Mr. Zahn was the next lowest bidder for the plumbing contract.

I and the Building Committee released ASCO from the plumbing contract.

I am familiar with the specifications and the notice of bidding for this particular project. The project in question is an addition to the present courthouse.

It was the intention to occupy the present courthouse in its present state during the entire period of construction, and because of the construction it was necessary to close the front door.

[fol. 18] The ASC is an office for the Security Credit Association, which is a branch of a federal lending agency for farmers. They occupied a small room on the bottom floor and they moved out for the simple reason that the courthouse was under construction and their moving had nothing to do with the picketing so that insofar as the tenants of the courthouse are concerned they are occupying offices and they are doing business just the same as before we commenced construction. So, insofar as the County is concerned, there has been no damage to the county in the occupancy of the present courthouse.

I made the statement that one of Reeke's men saw me, and said that the union men would not work with the non-union men. He didn't tell me who he was other than he was employed by Reeke. He was only a workman for Reeke, not an officer of the union, nor did he represent to be such officer. All that Dick Garot, Business Representative of the Plumbers Union, told me is that he understood that we were going to let this contract to a non-union plumber, and that we could expect trouble because the union men would not work with non-union men. That is all he told me.

There was only one picket on the job, and he was walking on 4th street, which is the west entrance to the Courthouse. There is also an entrance on the east side of the Courthouse. The Courthouse is a full square block, and there are public streets on each side of the Courthouse. [fol. 19] Both the east and front doors were used, and the front door was used more than the rear. The Courthouse is about two to three blocks from the downtown district, and all around the Courthouse it is well built up with both

residential and business places. All four streets surrounding the Courthouse are used by a large number of automobiles and pedestrians; it is a well traveled street.

The population of Sturgeon Bay is around 7,200, I think. I was around the building almost every day. As Chairman of the Property and Building Committee, I was there almost every day, or every other day, but didn't oversee the work on the new addition. I left that mostly to the inspector, the architect.

I don't recall the exact wording which appeared on the picket sign that was carried by this one gentleman.

I have the figures on all of the construction in connection with the addition; but I couldn't tell you right offhand; but the County Clerk is here and he has the actual contracts with him. I don't know the date of the contract that Mr. Zahn signed. I know when the contracts were opened. No federal funds were used that I know of. I never did call either the sheriff's department or the police department in connection with the picketing.

I never saw any necessity for the use of local police officers to maintain order.

Redirect Examination

[fol. 20] I attended the meeting of the County Board last night on the 24th of July. At that meeting a resolution was passed ratifying the wage scale set forth in the specifications. Prior to the time that the contracts were let, the Property Committee approved the specifications. The wage scales were in those specifications, and we approved them.

Recross Examination

The Building Committee approved the wage scale as set forth in the specifications and also the County Board. I think it was on April 16, and last evening the County Board approved the minimum wage scale as listed in the specifications. The Property Committee accepted them in April, and not the entire County Board. The Property Committee had been authorized prior thereto by a resolution or motion passed at the County Board to take charge of this construction.

When Richard Garot, the Business Representative of the Plumbers Union talked to me, the contract had not been signed, I think. But the plaintiff, Zahn had been designated as the accepted bidder. About all Mr. Garot said was that we could expect labor trouble if we accepted his bid. He did not say how we could avoid labor trouble. He did not ask us to award the contract to a union plumber. About all he told me was that if we had Zahn, being a non-union contractor, that the union men wouldn't work alongside of him. He did not mention what men wouldn't work, [fol. 21] he just mentioned union men. He just said if Zahn, who is a non-union plumber contractor, was awarded the contract that we could expect labor trouble because other union men would not work with him. This conversation took about fifteen minutes.

.

Direct Examination of Lawrence Johnson

By Mr. Howe:

I am Chairman of the Door County Board.

I am familiar with this problem. I didn't see the first picket. I saw the picket for the first time yesterday. I heard the testimony that the picket picketed on the south side of the Court House towards the front door. I would say that street was both residential and business. There are no business establishments on that street; nothing except schools. As far as I know the county or the high school agricultural department building is there and there are a couple of residences and one tenant building, and one apartment building. There is a dead end street to the north as you go out the front entrance from the courthouse. . . .

Since the courthouse construction began there is no traffic through the front door of the courthouse. I would not say there is much traffic along that street in front of the courthouse when I have been there. I would characterize [fol. 22] it as medium perhaps. I am not a resident of Sturgeon Bay. I didn't get there every day and I would say there is very little traffic. It does not compare with the traffic on Main Street.

*No Cross Examination**Direct Examination of Theodore Oudenhoven*

By Mr. Howe:

I am known as Dick Oudenhoven, and I operate the Dick Oudenhoven Construction Company. I entered into a contract with Door County on about April 1st to do general contracting on a courthouse addition. Since entering this contract I have not had any labor dispute with my employees. Offhand I don't know how much time I have been unable to work on the job because of pickets there. I have no dates on when the picket was placed on the job. The last picket went on I guess about a week ago Monday. We have not worked on the job since a week ago Monday when the picket went on. The picket was on before that, then taken off again. I don't know how much we worked—three days, a couple days, or something. I think the picket must have went on about Wednesday of last week. That's about it. It would be about the 17th day of July as near as my memory is. There was a picket on prior to that, then that picket was taken off. We worked when the picket was off. None of my employees are working now. The last day that we worked must have been the 17th, the day that the [fol. 23] picket came back. The reason that the men are not working is they wouldn't cross through the picket line. All our men are union and the minute the picket comes on they walk off. The superintendent told me that the picket was on and we would have to leave the job. No employee told me that personally. He is not in the court room. Offhand, I wouldn't know what losses there may be. Starting, losing time between, it always costs us money. How much it is going to cost, I don't know. It will not be a substantial amount. My contract called for carpenter, concrete, masonry and the entire structure of the building except plumbing, heating. The painting is in our contract. No plumbing, no heating, no electric. I think that's it. These last are sub-contracted directly with the county.

Cross Examination by Mr. Warne

I am named on the contract of the Falls River Valley Contractors Association and Building Trades Employers Association of Green Bay. (See Exhibit A) I am a member of that association. I am acquainted with Article 9 which provides, "The refusal of an employee to enter and do work or make deliveries in a place where a strike or lock-out is in force shall not be deemed a violation of this agreement nor shall it be justification for discharge." I am listed as a member of that Association with a contract with the International Hod Carriers and Common Laborers Union. (Exhibit B) The contract was signed by the association in my behalf and I am working under that agreement. On page 20, Article 8, provides: "Picket Line: The contractors shall not request nor instruct any employee to go through a picket line. The refusal of an employee to enter and do work or make deliveries in a place where a strike or lockout is in force shall not be deemed a violation of this agreement nor shall it be justification for discharge."

I never requested any of my men to cross the picket line. I do not have any figures relative to the contract I signed with the county. I was not subpoenaed by the defendants. I was asked to come up for the County Board, and when I called home this noon they told me at the office there was a subpoena there. I don't know who it is.

The total contract for the general contract on this building was \$267,711. In the past year we have been running possibly two-thirds labor, or one-third labor and two-thirds material. That would vary according to the type of contract. This was a fire-proof steel concrete construction. In the construction of that building we were to use concrete beams with just steel reinforcing rods. We purchased the reinforcing rods at Cook and Brown, Oshkosh. I don't know if they purchased them from outside of the state of Wisconsin. I suppose they are not milled in Wisconsin. Offhand, I don't know the amount of steel used in the building.

[fol. 25] *Direct Examination of Arnold G. Zahn*

By Mr. Howe:

My name is Arnold G. Zahn. I entered into a contract with Door County to do plumbing work on the courthouse addition. I have a plumbing shop in Sturgeon Bay with three employees, Herman Peterson, Bob Peterson, and Del Sherm. I worked on the job myself as a plumber. I have operated the shop five years. I have never had an organized shop or union shop. My employees never asked for a union election. I do not have a labor dispute with my employees at this time. Once I was contacted by the union after entering into this contract. Mr. Richard Garot of the Plumbers A.F. of L., 298, contacted me. He contacted me at my shop. He asked me about joining. I said I couldn't and that it would put me out of business. I had no conversation with reference to my employees. The conversation about joining the union all circulated around this courthouse job; that I should join, otherwise there may be a little dispute over there. The conversation took place in my shop. Mr. Garot left his card. (Exhibit 1) He left his card in case I wanted to contact him for some questions. I don't remember if he stated that or not. I attempted to contact him twice. I asked him to come and call on me. He said he would. To permit the courthouse to be completed, I tried to get rid of the contract. I thought that would be the only way it would be built, if I was out of it. [fol. 26] The Union Representative did not tell me any way to prevent the picketing and stopping of the job; only that I join the union.

Cross Examination by Mr. Warne:

I had only one conversation with Mr. Garot at my shop. All he ever said to me, he asked me to join the union or there may be a little dispute over there; meaning the courthouse.

I work at the tools of my trade as a plumber. As a licensed master plumber I work along side of my men. I only have myself and one apprentice. * * *

I did not withdraw from this contract, not totally. Some time around the 8th or 9th or 5th of July, in that neighborhood, the first picket was withdrawn from the job, and everybody went back to work with the exception of me and my apprentice. The next picket went on July 17th. We did not work on that project between July 5th and July 17th. A week ago last Saturday in the afternoon I went over there and worked for about three hours. The other workmen on the project were not there because they don't work on Saturdays. On the 13th, that is the Saturday I worked. I was not the low bidder on the project.

[fol. 27] *Direct Examination of Richard Garot :*

By Mr. Howe:

My name is Richard Garot. I am business representative of the Plumbers Local 298, A.F. of L., CIO. I am aware of the picket that was on the Door County job during the month of July. I don't have the exact date he went on first, I think it was on the 17th. He went on a week ago Wednesday; that was the second time. There was another picket there before in June. He ended his picketing about July 5th. He was on seven or eight days from approximately the 27th or 28th of June, until July 5th. The picket was replaced on the 17th of July, to date.

I have authority to put a picket on any job where there is a non-union plumber working on the job from our union, Plumbers Local Union 298, by action of a motion at a regular meeting. This picket was placed as a result of my initiative. I put the picket there because we had non-union plumber contractor and plumbers on the job. I expected the men to come off like they did. I expected the men to stop working as soon as I put the picket on, the union men.

A union man who crosses the picket line would probably be disciplined in some way, but I don't know how, by his own union. I don't know what would happen to a plumber if he crossed a picket line; we never had one do it, so I couldn't tell you. It has been my experience when you put a picket on, the job stops.

[fol. 28] *Direct Examination of Walter Ducat*

By Mr. Howe:

I am Treasurer of the Building Trades, Green Bay.
I do not know Fred Renard.

No action was taken on the part of the Building Trades Council with regard to the picketing of the courthouse job.

Direct Examination of Fred Renard

By Mr. Howe:

My name is Fred Renard. I live in the Town of Union. I was a picket on the courthouse job starting June 27th. I worked 42 hours. I received a card from the gentlemen who instructed me to picket. (Exhibit 4—This card reads: "Jack O'Malley, Building and Construction Trades Council, Green Bay and Vicinity") I recognized the person who instructed me to picket. It was Walter Ducat. * * * He gave me the card so I could call up.

I am a member of Local 539 of the Laborers Union. On the sign I carried when I was picketing it was written that there was a guy that didn't belong to Local 298 Plumbers; the workers didn't belong to Plumbers 298, A.F. of L., C.I.O.

[fol. 29] *Cross Examination by Mr. Warne:*

I was the only picket on the job. I walked on the west side of the courthouse and on the south side half way the block and all the way on the west side. I did not stop any men or anything, any trucks from going in and out of the premises. Nobody from management or police or sheriff's department asked me to move away from the picketing.

I do not live in Sturgeon Bay. I do live in Door County. I am pretty much acquainted with the downtown district of Sturgeon Bay. The first day I did see a lot of traffic, but after that I didn't any more. I wouldn't call it a well-traveled street that goes by the courthouse; I think the one on the east side would be more traveled. More than the other side. The courthouse is two blocks from the stop

and go light and that is where the business district starts. There is a school directly across the street from the courthouse on the north side. There are homes built up around that area around the courthouse, some on the south side and some on the west side, and also on the east side. I saw some people walking along the sidewalk by the courthouse.

Redirect Examination by Mr. Howe:

I walked on the sidewalk when I was picketing. I didn't commit any unlawful act during the time I was picketing to my knowledge, I don't think so.

[fol. 30] *Direct Examination of George Reeke*

By Mr. Warne:

I live in Green Bay, and I am president of the George F. Reeke Company. We are plumbing, heating and air conditioning contractors. I have the contract for the heating in the Door County Court House Addition. * * * The contract provides \$36,964 for all of the heating and ventilating. We furnish the architect with a breakdown of our contract price which is used for the purpose of drawing estimates on the contract. I will use those figures with your permission. Labor is \$8063.77. Materials, ten items. Item one,—pipes, fittings, valves, hangers etc., \$3369.95. Not all of those items are manufactured outside of the state of Wisconsin. There is no pipe milling in Wisconsin, there are very few sheeting companies; I don't believe very many valves are made here. I would say probably 90 per cent comes from outside of Wisconsin. I can qualify that. We buy these supplies from wholesalers frequently in the State of Wisconsin, who, in turn buy them from their sources of supply. Many times we do not know their sources of supply. Boilers, \$2205.91. The boilers are manufactured in Trenton, New Jersey. They are purchased through a wholesale house in Green Bay, Wisconsin. Condensate return pump, \$478.18. It is manufactured by the Chicago Pump Company. I am quite sure their plant is in Chicago or [fol. 31] suburb. Radiators, \$2186.18, manufactured in

Iowa. Unit Ventilators, \$1809.59, manufactured in Detroit Michigan. The next item is a Bond from the Federal Insurance Company of Seaton, New Jersey. The balance of the items are sub-contractors. Sheet Metal Work, \$6787.33. The sub-contract is awarded to a Green Bay firm. They will buy their plates through regular sources, they will fabricate it in Green Bay and deliver to the job site. They are put together like a box. The material itself is not made in Wisconsin. In sheet metal work the material would be probably one-third of the total contract cost. Temperature Control, \$9377.46, from the Johnson Service Company in Milwaukee, and that includes the labor of installing that at the job site. I think the labor would amount to about 20 per cent. To the best of my knowledge they have a manufacturing plant in Milwaukee. The next item is insulation, \$1861.04. I don't know who the subcontractor will buy that from, but it is not in the State of Wisconsin. The next item is painting, \$328.41. Offhand, I would say is (sic) represents 80 per cent labor. I don't know if the paint is made outside of Wisconsin. Electrical work is \$218.95. That's the wires to connect the switches to the fans and motors, etc. I do not know what represents materials and labor. The next item is labor, \$8063.77. . . .

Patrick Martin was called as a witness, and after he was identified the record indicates discussion by counsel [fol. 32] and finally the following stipulation:

STIPULATION OF FACTS

Mr. Warne: At this point then we will clarify it. I was going to call the County Clerk and I conferred with him during the recess for the purpose of showing the project cost, and he tells me it is approximately \$450,000, exclusive of furniture with which we have no concern. So under that 35 per cent represents labor on the construction job, 65 per cent represents material. Of that 65 per cent, 15 per cent is manufactured in Wisconsin, and 50 per cent is manufactured outside of the State of Wisconsin.

The Court: Is that conceded and stipulated?

Mr. Howe: Yes.

The Court: All right, let the record so show.

Direct Examination of Richard Garot

By Mr. Warne:

My name is Richard Garot. I live in Green Bay and I am the business representative for the Plumbers, Steamfitters Local 298. Local 298 has jurisdiction of Door County.

I contacted Mr. Zahn about April 25th at Zahn's Plumbing, Sturgeon Bay. At that time I asked him if he could sign a union contract with our union on account of him being low bidder on the courthouse. He told me he had three men employed by him. That represented one apprentice and two regular men. One of them was a member [fol. 33] of the union and one was not. At that time I asked him to sign a contract, if he could sign a contract with our union or else there may be a little dispute on the courthouse job. We had a little conversation about different things, but I guess that was all pertaining to this case. There was conversation at that time about the fact that one of his men belonged to the union. He told me that. He was not working on the courthouse job. He called me after that at my home in Green Bay. He asked me if he could sub-let his contract to a union contractor. I told him I didn't see any reason why he couldn't. He asked me if it would be legal, and I told him I would have to see my attorney on that. Then he called me back again on Saturday afternoon, and I told him it would be perfectly alright with us if he wanted to sub-let his contract. He said, "Maybe I don't want to sub-let my contract." I said that was up to him and that was the day he was working on the job, the 13th of July.

The picket was placed on the job at my request. I asked Mr. Ducat to get the picket, and he placed it there at my request. The purpose of that picket was to leave the union men know that the job was not 100 per cent union, and to leave the public know that the job was not 100 per cent union.

Cross-Examination by Mr. Howe:

It was not to stop work on the job as long as the non-union plumber contractor was there. I thought that would

[fol. 34] be the effect of the picket, but I didn't know that is something nobody knows, I guess.

Local 298 of the Plumbers Union got jurisdiction in Door County back in 1955, I guess. The employee that Zahn had, I was told, was a member of the Metal Trades. Our union does not have jurisdiction over the Metal Trades. The Trades Council does not have jurisdiction over the Metal Trades in Green Bay. We do have jurisdiction if they work on a building trades job.

I had no conversation with any of Zahn's employees while I was in his shop.

I did not ask Mr. Zahn to join the union. I testified before that it has been my experience when a picket went on a job that the union men would stop work. I expect that placing a picket on the job at the courthouse would result in stoppage of work by men of other trades and crafts, if they are union men. That is what did happen.

Some but not all of the arguments of counsel and Mr. Victor Harding, who asked to be heard amicus curiae, was included in the record.

[fol. 38]

IN SUPREME COURT OF THE STATE OF WISCONSIN
Door Circuit Court

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD G.
ZAHN and THEODORE OUDENHOVEN, Respondents,

v.

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FIT-
TERS, AND APPRENTICES OF LOCAL NO. 298, AF OF L, and
BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN
BAY, WISCONSIN, AND VICINITY, Appellants.

ARGUMENT AND SUBMISSION—April 9, 1958

And now at this day came the parties herein, by their attorneys and this cause having been argued by William J. Duffy, Esq., and Donald D. Miller, Esq., for the said

appellants, and by Donald J. Howe, Esq., for the said respondents, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion:

[fol. 39]

IN SUPREME COURT OF THE STATE OF WISCONSIN

COUNTY OF DOOR, a Municipal Corporation, and ARNOLD G. ZAHN and THEODORE OUDENHOVEN, Respondents,

v.

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FITTERS, AND APPRENTICES OF LOCAL No. 298, AF of L, and BUILDING AND CONSTRUCTION TRADES COUNCIL OF GREEN BAY, WISCONSIN, AND VICINITY, Appellants.

JUDGMENT—May 6, 1958

This cause came on to be heard on appeal from the judgment of the Circuit Court of Door County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Door County, in this cause, be, and the same is hereby, affirmed with costs against the said appellants taxed at the sum of

Justice Currie concurs.

Justice Fairchild dissents.

[fol. 40]

[File endorsement omitted]

STATE OF WISCONSIN: IN SUPREME COURT

No. 273; August Term, 1957

COUNTY OF DOOR, a Municipal Corporation, et al.,
Respondents,

v.

PLUMBERS, STEAMFITTERS, REFRIGERATION, PETROLEUM FIT-
TERS, AND APPRENTICES OF LOCAL NO. 298, A F OF L, et al.,
Appellants.

Appeal from a judgment of the circuit court for Door
county: Arnold F. Murphy, Circuit Judge, presiding. Af-
firmed.

OPINION—May 6, 1958

Action commenced by plaintiffs County of Door, a municipal corporation, Arnold Zahn and Theodore Oudenhoven against defendants Local 298 of the Plumbers and Steamfitters Union of Green Bay and Building and Construction Trades Council of Green Bay, Wisconsin and Vicinity, for an injunction restraining the defendants, their agents and officers, from picketing the job site at the Door County court house addition in the city of Sturgeon Bay, Wisconsin. From a judgment granting the injunction prayed for, defendants appeal.

Early in 1957 Door County asked for bids on the construction of an addition to the court house at Sturgeon Bay. They were reviewed by the Door County Property and Building Committee and contracts were let to the low-
[fol. 41] est responsible bidders. On March 1, 1957 the County entered into a general contract with Theodore Oudenhoven for \$267,711. The general contractor had a contract with the Fox River Valley Contractors Association, the Building Trades Employers Association of Green Bay and with the International Hod Carriers and Common Laborers Union.

The County contracted for the plumbing with Arnold G. Zahn of Sturgeon Bay whose three employees were non-union. All the contractors on the job were union except Zahn.

Construction was begun and between June 26 and July 5, 1957, and between July 15 and 25, the defendant Union placed a picket on the sidewalk near the court house addition, carrying a placard to the effect that non-union workers were employed on the contract and the designation "Plumbers Local 298, A F of L, CIO." On the days the picket was there the union employees did not work and at the time of the trial the work had stopped completely.

The trial court found that no labor dispute existed between the plaintiffs and the defendants or between the plaintiffs or any of their employees or between the employees of the plaintiffs and the defendants, within the meaning of sec. 103.02 (3), Stats.; that the picketing was violative of secs. 103.535, 111.04 and 111.06 (2) (b), Stats., and granted the injunction.

Further facts will be stated in the opinion.

[fol. 42] MARTIN, C. J. It was stipulated that the total cost of the court house addition was \$450,000, exclusive of the furniture; of that amount, 35% represented labor on the construction; 15% represented material purchased in Wisconsin; and 50% represented material manufactured outside of the state of Wisconsin. It is admitted that no labor dispute existed, as found by the trial court.

Defendants contend that the picketing was for the sole purpose of informing the union men and the public of the non-union condition. The evidence is practically undisputed that after Zahn entered into his contract, Richard Garot, business representative of Local 298, called on him and asked him to sign a contract with the union "or else there may be a little dispute on the Court House job." Zahn testified he attempted, apparently unsuccessfully, to sublet his contract, and that the Union offered no solution to the work stoppage except that he join.

On cross-examination Garot testified:

"Q. It [the picketing] was also to stop work on the job as long as the non-union plumber contractor was there, wasn't it?

"A. No, sir.

"Q. Didn't you know that would be the effect of the picket?

"A. I thought it might be but I didn't know. That's something nobody knows, I guess . . .

"The Court: When you testified before you said that it has been your experience that when a picket went on a job that the union men would stop work?

"A. That's right."

The trial court found that the picketing was coercive action in itself and amounted to economic pressure and was designed to cause a work stoppage; that it was not confined to advertising the cause of the Union.

In *Teamsters Union v. Vogt, Inc.* (on reargument, 1956), 270 Wis. 321a, 74 N. W. (2d) 749, this court held that the "peaceful picketing" carried on by the Union at the entrance to Vogt's gravel pit was for the purpose of coercing [fol. 43] the employer to interfere with its employees in their right to join or refuse to join the Union, contrary to the provisions of sec. 111.06 (2) (b), Stats. and affirmed the granting of the injunction. On appeal (354 U. S. 284, 77 Sup. Ct. 1166, 1 L. Ed. (2d) 1347) the United States supreme court traced the history of the cases in which it had been required to consider the limits imposed by the Fourteenth Amendment on the power of a state to enjoin picketing. In the course of that discussion the court, by Mr. Justice Frankfurter, stated at p. 289:

"Cases reached the Court in which a State had designed a remedy to meet a specific situation or to accomplish a particular social policy. These cases made manifest that picketing, even though 'peaceful,' involved more than just communication of ideas and could not be immune from all state regulation. 'Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated,'"

It stated that as time went on its "strong reliance on the particular facts in each case demonstrated a growing

awareness that these cases involved not so much questions of free speech as review of the balance struck by a State between picketing that involved more than 'publicity' and competing interests of state policy;" and that the reassessments of its views "were finally generalized in a series of cases sustaining injunctions against peaceful picketing, even when arising in the course of a labor controversy, when such picketing was counter to valid state policy in a domain open to state regulation."

"This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." (p. 293)

and quoted from the opinion of the Maine supreme court in *Pappas v. Stacey* (1955), 151 Me. 36, 116 Atl (2d) 497, 500, where it was said:

"... there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing [fol. 44] is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during noncompliance by the employees with the request of the union." (p. 294)

Finally, it held that the policy of Wisconsin enforced by the prohibition of the *Vogt* picketing is a valid one.

See, also, *Retail Fruit Union, AFL-CIO v. NLRB* (9th Cir. 1957), 249 Fed. (2d) 591.

It was a fair inference for the trial court to conclude from the evidence in this case that the picketing was for the purpose of coercing the employer to put pressure on the employees to join the Union, in violation of sec. 111.06 (2) (b), Stats.

Defendants attempt to distinguish the *Vogt Case* on the ground that there the picketing was on a country road patronized by only a small part of the public whereas in this case it took place in a city where the traffic by comparison is heavy. The fact that the picketing here would

have more "advertising" value than it did in the *Vogt Case* does not require the conclusion that it was not meant as coercion of the employer. Under the circumstances the inference to be drawn was for the trial court; it properly concluded that the purpose was illegal.

The second question raised on appeal is whether, under the circumstances of this case, the state has jurisdiction. Appellants contend that interstate commerce is affected because 50% of the cost of the construction is for materials manufactured outside of the state, and that the National Labor Relations Act has preempted the field.

What we have here is the County of Door, an arm of the sovereign state of Wisconsin, entering into a contract for the construction of a building which is necessary and essential to the performance of its functions, a place where it can discharge its governmental responsibilities and enforce laws, civil and criminal. It is significant that the National Labor Relations Act defines the term "employer" [fol. 45] as follows:

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . . or any person subject to the Railway Labor Act . . ." Title 29 U.S.C.A., sec. 152 (2).

The Act further provides:

"The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers." Title 29 U.S.C.A., sec. 152 (1).

From this it is evident that the state or any of its political subdivisions is not included within the purview of the National Act.

In *Teamsters Union v. N. Y., N. H. & H. R. Co.* (1956), 350 U. S. 155, 160, 76 Sup. Ct. 227, 100 L. Ed. 166, (the so-called "piggy-back" case), the United States supreme court said:

"The N.L.R.B. is empowered to issue complaints whenever 'it is charged' that any person subject to the Act is

engaged in any proscribed unfair labor practice. Sec. 10 (b). Under the Board's Rules and Regulations such a charge may be filed by 'any person.' We think it clear that Congress, in excluding 'any person subject to the Railway Labor Act' from the statutory definition of 'employer,' carved out of the Labor Management Relations Act the railroads' employer-employee relationships which were, and are, governed by the Railway Labor Act. But we do not think that by so doing Congress intended to divest the N. L. R. B. of jurisdiction over controversies otherwise within its competence solely because a railroad is the complaining party. Furthermore, since railroads are not excluded from the Act's definition of 'person,' they are entitled to Board protection from the kind of unfair labor practice proscribed by sec. 8 (b). (4) (A)."

The implication is that, in the case of a political subdivision of a state, which is neither an "employer" nor a "person" under the Act, the N. L. R. B. has no jurisdiction.

Appellants rely on *Weber v. Anheuser-Busch, Inc.* (1955), 348 U. S. 468, 75 Sup. Ct. 480, 99 L. Ed. 546, but in that case a strike was the basis of the conduct complained of and it is not applicable here. In *McCarroll v. [fol. 46] Los Angeles County Dist. Coun. of Car.* (1957), _____ Cal. _____, 315 Pac. (2d) 322, (Cert. denied, March 1958), it was held that (syl. 7):

"It is only strikes used as a weapon in bargaining process that are unfair labor practices within exclusive jurisdiction of National Labor Relations Board."

We are not unmindful of the fact that two of the plaintiffs, Zahn and Oudenhoven, are "employers" under the National Act. However, it is not reasonable to assume that Congress, in enacting the Act, intended in any way to interfere with the governmental function of a sovereign state or its municipalities. This is evident from the distinction made in the "piggy-back" case and from the fact that Congress expressly excluded states and their political subdivisions from its definition of "employer" and did not include them in its definition of "person."

Counsel *amicus curiae* have called our attention to the recent decision in *NLRB v. Electrical Workers Local 313*,

34 Labor Cases, para. 71,447, in which the Circuit Court of Appeals for the 3rd Circuit on April 17, 1958 affirmed a decision of the N. L. R. B. in which it found that a county was a "person" within the purview of the National Act and entitled to protection from the activities proscribed by sec. 8 (a) (4) (A). The court said in its opinion:

"A governmental subdivision has no rights of its own; it is only an arm for carrying out the interest of the general public. If some individual or group of individuals has indulged in what the Congress has termed to be an unfair labor practice by which such entity is harmed we see no objection to the public interest being served by stopping the practice although not otherwise subjecting the municipal subdivision to the statutory obligations of an 'employer.' In other words, the majority of the Labor Board took the point of view consistent with recognized public policy.

"The point is not sun clear. There is no established authority on which to proceed; the answer depends first, upon the question whether the Board has been right before, and second, on the question of whether the 'piggy-back' case gives authority for the position the Board now takes. We think it does.

"The order of the Board will be enforced."

[fol. 47] We are in disagreement with this holding. It has long been held in this state:

"This raises for consideration the question whether a statute of general application containing no specific provision to the effect that the state is within it, applies to the state itself. It is universally held, both in this country and in England, that such statutes do not apply to the state unless the state is explicitly included by appropriate language." *State ex rel. Martin v. Reis* (1939), 230 Wis. 683, 687, 284 N. W. 580.

See, also, *Milwaukee v. McGregor* (1909), 140 Wis. 35, 121 N. W. 642; *State v. Milwaukee* (1911), 145 Wis. 131, [fol. 48] 129 N. W. 1101; *Sullivan v. School District* (1923), 179 Wis. 502, 191 N. W. 1020; *Fulton v. State Security and Investment Board* (1931), 204 Wis. 355, 236 N. W. 120.

In 82 C. J. S., Statutes, sec. 317, p. 554, the rule is stated as follows:

"Neither the government, whether federal or state, nor its agencies are considered to be within the purview of a statute unless an intention to include them is clearly manifested; and the rule applies, or applies especially, to statutes which would impair or divest the rights, titles, or interests of the government.

"The government, whether federal or state, and its agencies are not ordinarily to be considered as within the purview of a statute, however general and comprehensive the language of act may be, unless intention to include them is clearly manifest, as where they are expressly named therein, or included by necessary implication."

In 50 Am. Jur., Statutes, sec. 222, p. 199:

"In the process of construing Federal statutes, the general rule is that established rules for the construction of statutes prevail. However, it is a general principle to favor such construction of Federal statutes as would give them a uniform application throughout the nation. Moreover, in ascertaining the scope of congressional legislation, a due regard for a proper adjustment of the local and national interests, in the Federal scheme must always be in the background. Federal legislation cannot be construed without regard to the implications of the dual system of government in the United States. The courts should exercise great wariness in the construction of a statute where the problem of construction implicates a phase of federalism and involves striking a balance between national and state authority in a sensitive area of government." See cases there cited.

In *Palmer v. Massachusetts* (1939), 308 U. S. 79, 83, 60 Sup. Ct. 34, 84 L. Ed. 93, in an opinion by Mr. Justice Frankfurter, the United States supreme court said:

"Plainly enough the District Court had no power to deal with a matter in the keeping of state authorities unless Congress gave it. And so we have one of those problems in the reading of a statute wherein meaning is

sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government."

[fol. 49] And in *Trade Comm'n v. Bunte Bros.* (1941), 312 U. S. 349, 351, 61 Sup. Ct. 580, 85 L. Ed. 881, in another opinion by Mr. Justice Frankfurter:

"To be sure, the construction of every such statute presents a unique problem in which words derive vitality from the aim and nature of the specific legislation. But bearing in mind that in ascertaining the scope of congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background, we ought not to find in sec. 5 radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated. *Minnesota Rate Cases*, 230 U. S. 352, 398-412."

By the Court: Judgment affirmed.

[fol. 50] CURRIE, J. (Concurring). There would seem to be no question but that, if it were not for Door county being a party plaintiff, there would be federal preemption here, and state action would be precluded under *Wisconsin E. R. Board v. Chauffeurs, etc., Local 200* (1954), 267 Wis. 356, 366, 66 N. W. (2d) 318. This is because, as pointed out in such case, secs. 158 (a) (3) and 158 (b) (2), 29 USCA, comprising part of the Taft-Hartley amendments to the National Labor Relations Act, make illegal the same type of union activities, where interstate commerce is involved, as does sec. 111.06 (2) (b), Wis. Stats. [fol. 51] The majority opinion grounds its holding, that there is no federal preemption, upon the fact that Door county is not a "person" within the definition of such term as used in the National Labor Relations Act. Such defini-

tion is to be found in sec. 152 (1), 29 USCA.¹ The statute material to the present controversy is sec. 160 (b), 29 USCA, which covers the issuance of a complaint by the National Labor Relations Board charging an unfair labor practice after charges have been filed with such board and an investigation has been made thereof. While the word "person" is employed by such section in describing against whom a complaint is to be issued, such word is not used to describe or limit who may file a charge which may result in the issuance of a complaint.

There is nothing in the National Labor Relations Act which would have precluded Door county from filing a charge against the instant defendants with the National Labor Relations Board. This is pointed out in the dissent filed by Mr. Justice Fairchild. Therefore, it cannot be held that congress has failed to preempt the field because the definition of the word "person" in the National Labor Relations Act does not embrace a state, or an instrumentality thereof such as a county.

However, there is another basis upon which the judgment below may be sustained. A county is an arm or agency of the state and in the erection of a courthouse, [fol. 52] or addition thereto, it is engaged in a governmental function. *Green County v. Monroe* (1958), 3 Wis. (2d) 196, 87 N. W. (2d) 827. Under our federal system of government it is implied in the United States constitution that the national government, in the exercise of its powers, may not prevent the state, or an agency thereof, from discharging its ordinary functions of government. Mr. Justice Brewer, in *South Carolina v. United States* (1905), 199 U. S. 437, 451-452, 26 Sup. Ct. 110, 50 L. Ed. 261, stated this principle with a clarity of language that would be most difficult to improve upon:

"Among those matters which are implied, though not expressed, is that the Nation may not, in the exercise of its powers, prevent a State from discharging the ordinary

¹ "The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

functions of government, just as it follows from the second clause of Article VI of the Constitution, that no State can interfere with the free and unembarrassed exercise by the National Government of all the powers conferred upon it."

The serious delay, which the plaintiff county experienced in the building of the addition to its courthouse by reason of the unlawful acts of the defendants, tended to interfere with the performance of its governmental functions. While congress may preempt the field of labor relations as they may affect interstate commerce, the courts of the state under the principle of *South Carolina v. United States*, *supra*, can protect the governmental functioning of the state, or one of its agencies, against acts which unlawfully interfere therewith. Both federal and state statutes make the defendants' activities illegal under the findings of fact of the trial court. We would have an entirely different problem if congress had legislated that all peaceful picketing of an employer, who is engaged in a business affecting [fol. 53] interstate commerce, is a valid activity not subject to being enjoined by any court.

The trial court, in addition to finding the activities of the defendants illegal under sec. 111.06 (2) (b), also found that the same violated sec. 103.535 because no "labor dispute" existed under the definition of such term set forth in sec. 103.535. Sec. 103.535 is clearly unconstitutional and void under *American Federation of Labor v. Swing* (1941), 312 U. S. 321, 61 Sup. Ct. 568, 85 L. Ed. 855, and *Waukesha v. Plumbers & Gas Fitters Local* (1953), 270 Wis. 322, 71 N. W. (2d) 416. See also *Milwaukee Boston Store Co. v. Amer. Fed. of H. W.* (1955), 269 Wis. 338, 356-357, 69 N. W. (2d) 762. However, the finding of a violation of sec. 111.06 (2) (b) is sufficient to sustain the judgment below.

For the reasons stated herein I concur in the result.

[fol. 54] FAIRCHILD, J. (dissenting). In my opinion the circuit court lacked jurisdiction to enjoin the conduct of appellant union and the judgment ought to be reversed. The peaceful, orderly, one-man, truthful picketing was entirely lawful unless motivated, as found by the court,

to halt construction "to attempt to coerce the plaintiff Arnold G. Zahn to force his employees to organize into a union shop, or in the alternative, to force . . . Zahn to release his contract with the plaintiff County of Door."

The union's conduct affected interstate commerce. This appears from the stipulated fact that material valued at \$225,000, manufactured outside Wisconsin, was to be used. The issue of whether the union's conduct was so motivated as to be wrongful was within the exclusive jurisdiction of the National Labor Relations Board. *Wisconsin E. R. Bd. v. Chauffeurs, etc., Local 200* (1954) 267 Wis. 356, 366, 66 N.W. 2d 318. Congress has preempted the field as to [fol. 55] conduct with which the national act expressly deals. *Guss v. Utah Labor Board* (1957) 353 U.S. 1, 9.

The majority opinion appears to be based upon the proposition that conduct which would be an unfair labor practice under the federal act can be enjoined by a state court if an arm of the state seeks that relief because of damage to its interests. I respectfully conclude that this view is in error in two respects:

(1) It is based upon an assumption that the county is disqualified, under the national act, from arousing the jurisdiction of the national board by filing a charge. Whence does this disqualification arise? It is not from the statute itself, but from a regulation adopted by the national board which provides that a charge may be filed by "any person". Concededly the national act defines "person" in a way that does not expressly include an arm of a state. Nevertheless the only statutory pre-requisite to issuance of a complaint by the board is that an unfair labor practice be "charged".

(2) The majority reasons that if a county can not file a charge with the national board, conduct which would be an unfair labor practice affecting interstate commerce may be dealt with by a state court upon complaint of the county. It must be true that the identical conduct is also within the jurisdiction of the national board because Zahn, the employer, and other interested persons, would clearly be qualified to file a charge with the national board. There are issues of fact and law. Opposite and conflicting re-

sults could be reached in the two fora. Congress did not intend that result.

The picketing involved in this action is unlawful, if at all, only because it is conduct in the field of labor relations and constitutes an unfair labor practice under the national act. If mass picketing or violence or overt threats of violence were involved, state action to prevent those things would appear to be proper. *Auto Workers v. Wisconsin Board* (1956) 351 U.S. 266, 274. But with violence [fol. 56] absent, and an effect upon interstate commerce present, then the matter is wholly in the field which is now held to be preempted by Congress, and entrusted exclusively to the jurisdiction of the national board.

[fol. 57] IN SUPREME COURT OF WISCONSIN

[Title omitted]

ORDER DENYING REHEARING—June 26, 1958

The Court being now sufficiently advised of and concerning the motion of the said appellants for a rehearing in this cause, it is now here ordered that said motion be; and the same is hereby, denied without costs.

[fol. 58] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 59] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—November 10, 1958

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.